Rule 26, Ariz. R. Crim. P.

RESPONSE TO MOTION TO PRECLUDE DNA TESTING UNDER A.R.S. § 13-610

> ***United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), does not invalidate Arizona's DNA testing statute, A.R.S. § 13-610.**
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> **Note: This Response exceeds the general ten-page limit for motions in superior court imposed by Rule 35.1, Ariz. R. Crim. P., so if you file this Response, you should also file a motion to exceed page limits.**

The defendant has moved this Court to preclude this Court from ordering that a DNA sample be taken pursuant to A.R.S. §13-610. The State asks this Court to deny the defendant's motion, for the reasons set forth in the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Factual and Procedural Background

[Explain what charges were filed against the defendant and explain what point in the system the case is in– that is, pending trial, pending sentencing, post-sentencing, etc. If the defendant has been convicted or pleaded guilty to any offense(s), state the facts accordingly.]

The defendant [If motion is filed before conviction, insert: is charged with/ is awaiting trial on] OR [If the defendant has been convicted, insert: Because the defendant pleaded guilty to/ was found guilty of] OR [Because the juvenile admitted/was adjudicated delinquent on] the offense of [name of offense], A.R.S. § 13-610(N)([insert appropriate subsection number]) requires [the Department of Corrections/ the County detention facility/ the County probation department/ the Department of Juvenile Corrections] to obtain from the defendant a "sufficient sample of blood or other bodily substances for deoxyribonucleic acid [DNA] testing and extraction." The sample must be secured within thirty days after the defendant/juvenile is sentenced/placed on

probation/committed to the State Department of Corrections/detained in a county juvenile detention facility]. The sample obtained from the defendant must then be transmitted to the Department of Public Safety [DPS] for analysis. A.R.S. § 13-610(H) requires DPS to "make and maintain a report of the results" of DNA testing and "maintain samples of blood or other bodily substances for at least thirty-five years." If a sample is already on file from a defendant, the agency "shall not" secure an additional sample. A.R.S. § 13-610(G). § 13-610(I) limits the use of such samples and test results to "law enforcement identification purposes," proceedings in "a criminal prosecution or juvenile adjudication," or "a proceeding under title 36, chapter 37" [a civil sexually violent persons case].

The defendant now argues that under the reasoning of *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), the forced taking of a DNA sample is unconstitutional as an unreasonable search under the Fourth Amendment unless there is "reasonable, individualized suspicion" to believe that he will reoffend. He asks this Court to follow *Kincade* and to order that no DNA sample can be taken from him without his consent.

B. Argument

Neither *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), nor its reasoning invalidates Arizona's DNA testing statute, A.R.S. § 13-610, or prohibits this Court from ordering DNA testing.

1. Even if it is correctly decided for purposes of federal law, the Ninth Circuit's decision refers only to the Federal DNA Analysis Backlog Elimination Act of 2000 and does not bind the Arizona courts in determining the validity of A.R.S. § 13-610.

At the outset, it is important to remember that the Arizona courts are not bound by the Ninth Circuit's interpretations of federal constitutional issues. As the Arizona Supreme Court stated in *State v. Sansing*, __ Ariz. __, __, ¶ 5, n. 2, 77 P.3d 30, 33

(Sept. 24, 2003), the Arizona Supreme Court is "not bound by the Ninth Circuit's interpretation of what the Constitution requires." *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003) is a Ninth Circuit case and it does not bind Arizona courts.

Second, *Kincade* dealt only with the validity of a federal statute, the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135 [the 2000 DNA Act]. In 1994, Congress passed the "Violent Crime Control and Law Enforcement Act" [the DNA Act], which authorized the FBI to formally establish the "Combined DNA Index System" (CODIS). CODIS is a national database index of DNA samples from convicted offenders, crime scenes, and unidentified human remains. As the Ninth Circuit noted in *Kincade*, "Before the DNA Act was passed, all fifty states had adopted some form of legislation mandating DNA collection for inclusion into CODIS."

However, although CODIS was officially established in 1994, no DNA samples were collected from persons convicted of **federal** offenses until 2000, when Congress enacted the 2000 DNA Act. The 2000 DNA Act "serves as the statutory basis for the forced extraction of blood samples from **federal** parolees, probationers, and prisoners." *Kincade* [emphasis added.] The Ninth Circuit held that the 2000 DNA Act violated the defendant's Fourth Amendment right to be free from unreasonable searches. The Ninth Circuit's analysis did not address any state statute, let alone any Arizona statute. Therefore, *Kincade* does not say, or imply, anything about the validity of Arizona's DNA testing scheme, A.R.S. § 13-610.

The State also notes that, as the Ninth Circuit mentioned in *Kincade*, *supra*, all fifty states have DNA collection statutes more or less similar to Arizona's. These state statutes have been repeatedly challenged as violating due process and as

unreasonable searches and seizures. Nevertheless, both federal courts and state courts have repeatedly upheld the state DNA collection statutes for over ten years.[1] As stated in Annotation: Validity, Construction, and Operation of State DNA Database Statutes, 76 A.L.R.5th 239 (2000):

> Those courts faced with the question whether a DNA database statute authorizes an unreasonable search and seizure in violation of the Fourth Amendment (and occasionally analogous state constitutional provisions)

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[1] *See*, *e.g.*, *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999) [upholding Connecticut state law]; *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) [upholding Virginia state law]; *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) [upholding Texas state law]; *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1994) [upholding Oregon state law, but note that the Ninth Circuit in *Kincade* states that its own decision in *Rise* has now been "repudiated"]; *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) [upholding Colorado state law]; *Shaffer v. Saffle*, 148 F.3d 1180 (11th Cir. 1998) [upholding Oklahoma state law]; *Vore v. United States Department of Justice*, 281 F.Supp.2d 1129 (D.C. Ariz. 2003) [upholding federal DNA Act of 2000]; *United States v. Sczubelek*, 225 F.Supp.2d 315 (D.C. Del. 2003) [same]; *Kruger v. Erickson*, 875 F.Supp. 583 (D.C. Minn. 1995) [upholding Minnesota state law]; *Saunders v. Coman,* 864 F.Supp. 496 (E.D. N.C. 1994) [upholding North Carolina state law]; *Hammonds v. State*, 777 So.2d 750 (Ala. App. 1999) [upholding Alabama state law]; *Matter of Appeal in Maricopa County Juv. Action Nos. JV-512600 and JV-512797*, 187 Ariz. 419, 930 P.2d 496 (App. 1996) [upholding Arizona state law]; *Alfaro v. Terhune*, 98 Cal.App.4th 492, 120 Cal.Rptr.2d 197 (Cal App. 2002) [upholding California state law]; *L.S. v. State*, 805 So.2d 1004 (Fla. App. 2001) [upholding Florida state law]; *In re Robert K.*, 336 Ill.App.3d 867, 785 N.E.2d 562, 271 Ill.Dec. 630 (Ill. App. 2003) [upholding Illinois state law]; *State v. Maass*, 275 Kan. 328, 64 P.3d 382 (2003) [upholding Kansas state law]; *Landry v. Attorney General,* 429 Mass. 336, 709 N.E.2d 1085, 76 A.L.R.5th 703 (1999) [upholding Massachusetts state law]; *Cooper v. Gammon*, 943 S.W.2d 699 (Mo. App. 1997) [upholding Missouri state law]; *State v. Notti*, 316 Mont. 345, 71 P.3d 1233 (2003) [upholding Montana state law]; *Gaines v. State,* 116 Nev. 359, 998 P.2d 166 (2000) [upholding Nevada state law]; *Kellogg v. Travis*, 188 Misc.2d 164, 728 N.Y.S. 645 (N.Y. Supreme Court 2001) [upholding New York state law]; *State ex rel. Juv. Dept. of Multnomah County v. Orozco*, 129 Or.App. 148, 878 P.2d 432 (Or. App. 1994) [upholding Oregon state law]; *Commonwealth ex rel. Smith v. Pennsylvania Dept. of Corrections*, 829 A.2d 788 (Pa. 2003) [upholding Pennsylvania state law]; *Johnson v. Commonwealth*, 259 Va. 654, 529 S.E.2d 769 (2000), *cert. den*., *Johnson v. Virginia,* 531 U.S. 981 (2000) [upholding Virginia state law]; *State v. Olivas*, 122 Wash.2d 73, 856 P.2d 1076 (1993) [upholding Washington state law]; *Doles v. State*, 994 P.2d 315 (Wyo. 1999) [upholding Wyoming state law].

> have uniformly expressed the view that it does not, whether the courts have applied traditional Fourth Amendment analysis, the doctrine of prisoners' reduced expectation of privacy, or the "special needs" doctrine.

Accepting the Ninth Circuit's reasoning in *Kincade* would require reversal of cases from virtually every State and many federal court decisions as well. In light of these and many other persuasive authorities upholding DNA collection statutes, the State respectfully suggests that the Ninth Circuit's analysis is suspect.

2. A.R.S. § 13-610 does not authorize any unreasonable search, because taking a DNA sample is a minimal intrusion for a legitimate governmental purpose, namely, to obtain and maintain evidence of a convicted defendant's identity.

It is unquestioned that drawing blood or taking any other bodily substance from a defendant without his consent is a search that implicates the Fourth Amendment and Article 2, § 8 of the Arizona Constitution. *State v. Jones*, 203 Ariz. 1, 9, ¶ 27, 49 P.3d 273, 281 (2002).

However, not all governmental searches are prohibited – only those that are **unreasonable**. *Petersen v. City of Mesa*, 204 Ariz. 278, 287, ¶ 37, 63 P.3d 309, 318 (App. 2003). Ordinarily, the validity of a search is determined by assessing its reasonableness in light of all the circumstances. "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-119 (2001) [citation and internal quotation marks omitted]. Thus, the question here is whether the governmental interests involved in taking a DNA sample from a defendant convicted of a qualifying offense outweighs the intrusion to the convicted defendant's privacy. A

review of the case law clearly shows that a DNA search authorized in Arizona by A.R.S. § 13-610 is reasonable.

In *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), the Ninth Circuit held that under the federal DNA Act, forced extractions of blood samples from convicted defendants were unconstitutional because they were unreasonable searches. First, the Ninth Circuit rejected as a "false analogy" the government's argument that blood draws for DNA data collection were "no more intrusive than fingerprinting." The court asserted that there is a "**constitutional** difference between invasive procedures of the body that necessitate penetrating the skin, and an examination or recording of physical attributes that are generally exposed to public view." [Emphasis in original]. The *Kincade* court stressed that, in its opinion, blood was constitutionally unique, saying, "In virtually every culture around the world, human blood possesses great symbolic power, and its spillage – whether in a drop or in a torrent – has carried enormous cultural significance." In a footnote, the court stressed again that its decision was limited to DNA sample collection from **blood draws**:

> We express no view as to whether the government may, pursuant to the Act, collect DNA samples from tissue shed from an individual's person, such as the saliva left on cups, cigarette butts, or chewing gum, although it would appear that were it to restrict itself to such actions, it would fall far short of accomplishing the Act's objectives. In the case of such collections, the privacy interests resulting from the maintenance of CODIS would be different. In any event, the need to puncture skin and draw blood is, as we reiterate, constitutionally distinct from all of these other activities.

Despite its insistence that blood is unique, the only citation the *Kincade* court gave for this proposition is "*Cf. United States v. Dionisio*, 410 U.S. 1 (1973)." *Dionisio* does not support the Ninth Circuit's position. *Dionisio* held that a grand jury investigating gambling offenses could subpoena suspects to produce voice exemplars to compare

with wiretap voice recordings. The *Dionisio* Court stated, "It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against compulsory self-incrimination." *Id*. at 5-6. Quoting *Holt v. United States*, 218 U.S. 245, 252 (1910), the *Dionisio* Court said that the Fifth Amendment's prohibition against compelling a defendant to give evidence against himself "is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Quoting from *Schmerber v. California*, 384 U.S. 757, 765 (1966), which allowed the State to draw blood from DUI suspects, the *Dionisio* Court noted that compelling a defendant to give voice exemplars for identification purposes, like extracting and analyzing blood samples, involved "no shadow of testimonial compulsion upon or enforced communication by the accused."[2] The Supreme Court concluded in *Dionisio* that compelling suspects to produce voice exemplars did not violate the Constitution. Thus, *Dionisio* does not support the Ninth Circuit's analysis that "blood is constitutionally unique."

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[2]The full quotation from *Schmerber* reads:

> Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

Schmerber v. California, 384 U.S. 757, 765 (1966) [footnote omitted].

It is clear that *Kincade* does not address the use of any DNA collection technique other than a blood draw and should not be read to extend to any other type of DNA collection. The State notes that in Maricopa County, DNA samples are routinely taken from defendants using "buccal swabs." That is, DNA is obtained from wiping the inside of a defendant's cheek with a cotton-tipped swab or piece of gauze, not from a blood draw. *Kincade* clearly states the Ninth Circuit's opinion that human blood draws are constitutionally unique, and this factor is not implicated by a cheek swab.

The defense may argue that *Kincade* is still applicable in Arizona because A.R.S. § 13-610 does not specify the technique to be used to obtain the sample, and, therefore, the defendant may in fact be subjected to a blood draw under that statute. However, in the absence of a showing that this particular defendant's skin has been, or will be, pierced for a blood draw, the State submits that *Kincade* clearly does not apply.

Further, even if a blood draw were involved here, the State submits that the Ninth Circuit's analysis that "blood is constitutionally unique" is fundamentally flawed. As the Oregon Court of Appeals reasoned in State *ex rel. Juvenile Dept. of Multnomah County v. Orozco*, 129 Or.App. 148, 152-153, 878 P.2d 432, 435 (Or.App. 1994), "While blood-testing is arguably a greater insult to human dignity than fingerprinting, [the Oregon DNA sample law] surrounds blood-testing with greater procedural safeguards. Like a fingerprint or a voice exemplar, blood-testing is a non-testimonial record of physical characteristics and involves none of the probing into an individual's life and thoughts that marks an interrogation or a search." [Internal citations and quotation marks omitted.] In a footnote, that court rejected a dissenter's opinion that piercing the skin to draw blood has any particular constitutional significance:

> The dissent argues that (1) blood tests differ from fingerprints because fingerprints, like voice exemplars, are not "hidden attributes;" and (2) that blood tests involve puncturing the skin. In regard to the first proposition, we take judicial notice of the fact that most people do not walk down the street with magnifying glasses to facilitate scrutiny of their fingerprints. Thus, fingerprints are not "public knowledge" any more than one's DNA is "public knowledge" if they had a bloody nose. In regard to the second proposition, we grant that blood is drawn by puncturing the skin, but the dissent does not persuade us that this difference is a constitutionally significant one. A full body cavity search does not puncture the skin, but arguably has more serious constitutional implications.

Id. at 153, n. 6. This argument foresaw the Ninth Circuit's reasoning in *Kincade* and illustrates its shortcomings.

Some of the courts that have upheld DNA sample statutes have relied on the "special needs" doctrine. The United States Supreme Court has recognized a "special needs" exception to the usual warrant and probable cause requirements for searches. This doctrine reasons that certain governmental functions present "special needs" beyond those of ordinary law enforcement that make the warrant and probable cause requirements inapplicable. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). In *Griffin*, the High Court upheld a Wisconsin probation condition that made probationers submit to warrantless searches of their homes based on a probation officer's "reasonable grounds" to believe that the probationer possessed contraband. The Court reasoned that a State's operation of a probation or prison system "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id*. at 873-74. The Court stated that probationers, like parolees, do not enjoy the absolute liberty to which other citizens are entitled, but only conditional liberty that depends on their observing the conditions of their release. "Supervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Id*. at 875.

Kincade rejected the "special needs" analysis, reasoning that the DNA samples obtained through the 2000 DNA Act were designed to serve an ordinary law enforcement purpose. However, the Ninth Circuit's analysis in *Kincade* depends on an underlying misunderstanding of the nature of DNA identification evidence. The Ninth Circuit relied upon *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) [invalidating a program of highway checkpoints to conduct suspicionless searches for illegal drugs] and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) [invalidating a hospital program of suspicionless testing of pregnant women for drug use and turning positive results over to police]. Based on these cases, the Ninth Circuit held that *Edmond* and *Ferguson* had effectively overruled its own earlier decision in *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995) [upholding the Oregon State DNA collection statute.] The Ninth Circuit reasoned that the 2000 DNA Act existed only for law enforcement purposes. The court stated that the purpose of the 2000 DNA Act was "the swift and accurate solution and prosecution of crimes generally," noting that the legislative history was "replete with references to the utility of DNA evidence in prosecuting crimes." *Kincade*, *id*. The Court rejected arguments that DNA samples were also useful to **exonerate** defendants, and concluded:

> Whatever benign secondary purposes these searches may happen to serve, the primary purpose is to provide law enforcement officials, both at the state and federal level, with **information about individuals that can be used** to identify them as criminals and **to prosecute them for their crimes.** Kincade, should he be subjected to such a search, in effect will have been **compelled to provide evidence with respect to any and all crimes of which he may be accused, for the rest of his life**.

Kincade, *id*. [emphasis added].

As this quotation shows, the Ninth Circuit erred in its "special needs" analysis because it failed to distinguish between searches intended to find **evidence of a *crime***

and those intended only to provide **evidence of a person's *identity*.** The searches invalidated in *Ferguson* and *Edmond*, *supra*, were "ordinary law enforcement" searches because they were designed to obtain evidence of a particular crime from a particular suspect so that that suspect could be prosecuted for that crime. That is, in *Ferguson*, the women were prosecuted for drug offenses directly based on the result of the suspicionless search drug tests themselves. Similarly, in *Edmond*, people stopped at the drug interdiction checkpoints were directly prosecuted for any drugs that the suspicionless searches might find. The Supreme Court held that such searches were invalid without some individualized suspicion.

By contrast, searches intended only to obtain identifying information, such as routine fingerprinting and photographing of a suspect, or the DNA searches here, are not focused on a particular defendant and do not attempt to find evidence of a particular crime. Thus, the DNA sample procedures provided in the federal DNA act and in A.R.S. § 13-610 are reasonable searches and do not conflict with *Edmond* or *Ferguson*. The Kansas Supreme Court explained the distinction between DNA collection and the impermissible searches in *Edmond* and *Ferguson* in *State v. Martinez*, 78 P.3d 769, 774 (Kansas 2003):

> The key distinction is that the drug testing and the checkpoint inspections provide evidence of current or ongoing criminal wrongdoing. Based on the evidence obtained from the drug test and the checkpoint inspections, officers have probable cause to immediately arrest someone for a current or ongoing crime. With DNA information, however, there is no immediate possibility of finding probable cause to support an arrest. Like fingerprint and photograph identification information, the DNA information does not, in and of itself, detect or implicate any criminal wrongdoing. It is this distinction that removes the collection and cataloging of DNA information from the normal need for law enforcement. With this distinction in mind, we agree with the courts that have found the collection and cataloging of

> DNA information to be a special need beyond the normal need for law enforcement.

The Ninth Circuit also said that in *Kincade*, *supra*, that taking a DNA sample from the defendant would compel him to provide evidence against himself. However, the Ninth Circuit's analysis is clearly wrong, because, as the Kansas Court stated in *Martinez*, *supra*, DNA samples are not incriminating evidence. Everyone has a unique DNA profile, but a DNA profile itself is not evidence of any crime. Just like a fingerprint or a photograph, a DNA sample in and of itself establishes nothing but identity. One federal court succinctly explained the distinction:

> A DNA sample is evidence only of one's genetic code. By itself, the sample does not reflect that the donor committed a crime. Unlike a urinalysis which can reflect the presence of illegal substances, the DNA sample only offers the potential to link the donor with a crime.

United States v. Sczubelek, 255 F.Supp.2d 315, 322 (D.C. Delaware 2003). Therefore, the Ninth Circuit's analysis in *Kincade* is fundamentally erroneous.

> **3. Taking a DNA sample from a convicted defendant is not an unreasonable search because a DNA sample is not evidence of a crime, but only evidence of identity, and a convicted defendant has no reasonable expectation of privacy in his identity.**

A DNA profile is evidence only of identity, and a defendant who has been convicted of a qualifying offense beyond a reasonable doubt has no reasonable expectation of privacy in his identity. As the Fourth Circuit stated in *Jones v. Murray*, 962 F.2d 302, 306-07 (1991):

> [W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes. This becomes readily apparent when we consider the universal approbation of "booking" procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular

> suspect's crime will involve the use of fingerprint identification. While we do not accept even this small level of intrusion for free persons without Fourth Amendment constraint, *see Davis v. Mississippi*, 394 U.S. 721, 727, 89 S.Ct. 1394, 1397, 22 L.Ed.2d 676 (1969), the same protections do not hold true for those lawfully confined to the custody of the state. As with fingerprinting, therefore, we find that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from incarcerated felons for the purpose of identifying them.

Since a suspect arrested on a probable cause finding has no privacy interest in his identity, it follows that a person convicted beyond a reasonable doubt of a qualifying offense also has no such privacy interest. *See Miller v. United States Parole Commission*, 259 F.Supp.2d 1166, 1173 (D.C. Kansas 2003) ["Plaintiff cannot claim a privacy interest in his identity. Plaintiff's status as both a parolee and a convicted felon negate any privacy interest he has in his identity"]; *State v. Martinez*, 78 P.3d 769, 775 (Kansas 2003) [A person convicted of a crime "has a reduced expectation of privacy in his or her identity"]; *McKune v. Lile*, 536 U.S. 24, 36 (2002) [A "broad range of choices that might infringe constitutional rights in free society fall within the expected conditions … of those who have suffered a lawful conviction."]

Persons who are in prison have no reasonable expectation of privacy in their identity sufficient to overcome the State's legitimate interest in determining their identity. In *People v. King*, 82 Cal.App.4th 1363, 99 Cal.Rptr.2d 230 (Cal.App. 2000), the California Court of Appeals upheld a California statute requiring defendants convicted of certain offenses to give DNA samples before being released. The defendant argued that forcing him to give blood and saliva samples violated the Fourth Amendment because he had a reasonable expectation of privacy in his body. The court disagreed, stating that the nature of prison confinement necessarily results in a significant reduction in the expectation of privacy.

> The reduction in a convicted person's reasonable expectation of privacy specifically extends to that person's identity. Indeed, not only persons convicted of crimes, but also those merely suspected of crimes, routinely are required to undergo fingerprinting for identification purposes. As to convicted persons, there is no question but that the state's interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might retain. … The fingerprints, photographs and physical descriptions of convicted persons are preserved as a matter of routine. And once an individual has been convicted of a crime or crimes, and has been incarcerated in a penal institution, his or her identity clearly becomes a matter of interest to prison officials. … By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities. In short, any argument that Fourth Amendment privacy interests do not prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government.

People v. King, 82 Cal.App.4th 1316, 1374-1375, 99 Cal.Rptr.2d 220, 226-27 (Cal. App. 2000).

The Arizona Courts have also recognized that persons who have merely been arrested on a finding of probable cause also have lowered expectations of privacy. *See State v. Beasley*, 205 Ariz. 334, 337, ¶ 10, 70 P.3d 463, 466 (App. 2003) [Upholding swabbing of arrested person's hands for gunshot residue; "Probable cause obviously existed to arrest the defendant for the shootings. Any legitimate expectation of privacy the defendant had was substantially diminished by that arrest."] The Arizona Courts have also repeatedly recognized that people convicted of crimes or adjudicated delinquent and placed on probation or incarcerated have a reduced expectation of privacy. See *State v. Montgomery,* 115 Ariz. 583, 584, 566 P.2d 1329, 1330 (1977); *Demarce v. Willrich*, 203 Ariz. 502, 504-505, ¶ 9, 56 P.3d 76, 78-79 (App. 2002); *State v. Kessler*, 199 Ariz. 83, 88, ¶ 20, 13 P.3d 1200, 1205 (App. 2000); *Holt v. Hotham*, 197 Ariz. 614, 616, ¶ 8, 5 P.3d 948, 950 (App. 2000); *Arizona Dept. of Public Safety v.*

Superior Court, 190 Ariz. 490, 495, 949 P.2d 983, 988 (App. 1997); *State v. Superior Court*, 187 Ariz. 411, 416, 930 P.2d 488, 493 (App. 1996); *State v. Bishop*, 137 Ariz. 361, 363, 670 P.2d 1185, 1187 (App. 1983).

Further, once a biological sample is lawfully procured from a defendant, no privacy interest persists in either the sample or any DNA profile obtained from that sample. In *State v. Hauge*, 103 Hawai'i 38, 79 P.3d 131 (Hawai'i 2003), Hauge was arrested for a robbery. The police obtained a search warrant to collect hair samples and to draw blood samples to aid in investigating the robbery. Hauge also became a suspect in a hotel burglary in which the burglar cut himself while breaking into a hotel room. The police obtained a DNA profile from the blood samples collected from the hotel room, compared it against the DNA profile obtained from the blood drawn under the search warrant, and found a match. Hauge was thus charged with the burglary. He moved to suppress the DNA evidence, arguing that the police were not authorized to use the biological samples for any purpose other than investigating the robbery, which was all the search warrant authorized. The trial court denied the motion to suppress, reasoning that once the police had lawfully obtained a biological sample, Hauge had no privacy interest either in the sample or in the DNA profile obtained from it. The Hawai'i Supreme Court affirmed, reasoning that Hauge's privacy interest in his blood and hair "terminated at the time the sample was obtained pursuant to a lawful search and seizure." The Hawai'i Court held that, regardless of the number of times the police tested Hauge's blood sample for its DNA, "no violation of his constitutional right to privacy occurred because the analyses did not exceed the objective for which the original warrant was sought – DNA testing for the purpose of identification." *State v. Hauge*, 103 Hawai'i 38,

52, 79 P.3d 131, 145 (Hawai'i 2003). The Court reasoned that, like fingerprints, the biological material tested for DNA is not analyzed to show anything of evidentiary value like alcohol or drugs; instead, its use is limited to "identification purposes only." In a footnote, the *Hauge* Court distinguished *Kincade*, *supra*, because, unlike Kincade's, Hauge's blood was drawn pursuant to a search warrant supported by probable cause. However, this distinction does not change the analysis of the issue because, since probable cause is sufficient to justify a search, the fact that the State has obtained a conviction based on proof beyond a reasonable doubt also suffices. *Id*. at 53 n. 6, 79 P.3d at 146.

The Hawai'i Court in *Hauge*, *supra*, noted that in *People v. Baylor*, 97 Cal.App.4th 504, 508, 118 Cal.Rptr.2d 518, 521 (Cal.App. 2002), the California Court of Appeals had held that "there is no constitutional violation of infringement of privacy when the police in one case use a DNA profile, which was lawfully obtained in connection with another case." The Hawai'i Court cited *Bickley v. State*, 227 Ga.App. 413, 489 S.E.2d 167 (Ga.App. 1997), which held that when DNA evidence was lawfully obtained via a search warrant in one case, there was no basis for suppressing that DNA evidence in another case brought by another police department. The *Bickley* Court stated:

> In this case defendant's blood was obtained pursuant to a warrant for the purpose of DNA testing, and that is the only test that was ever performed on defendant's blood. And no matter how many times defendant's blood is tested, the DNA results would be identical. What defendant is really objecting to is the comparison of his DNA with DNA derived from samples taken from the victims of crimes other than the one specified in the search warrant. We agree with the trial court that in this respect, DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations.

Id. at 415, 489 S.E.2d at 169 [internal quotation marks and brackets omitted].

Another factor that fails to support the Ninth Circuit's holding in *Kincade* is that, unlike searches for incriminating evidence, the Arizona DNA statutes are not case-specific. Under A.R.S. § 13-610, DNA testing is required of **all** persons convicted of qualifying offenses, rather than being targeted at a **particular** defendant in an effort to solve any **specific** crime or as part of an ongoing criminal investigation. "Although the samples may later be used for law enforcement purposes, traditional concerns of probable cause and reasonable suspicion are minimized by the statute's blanket approach to testing." *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999). In *State v. Martinez*, 78 P.3d 769, 775 (Kansas 2003), the Kansas Court reasoned that the purpose behind the warrant requirement was to protect citizens' privacy interests by assuring that government agents cannot conduct searches in a "random and arbitrary" way. The DNA testing requirements are required of all persons convicted of qualifying offenses:

> Here, State authorities are not allowed to choose which offenders will provide samples but are directed by the statute to collect and catalog samples from all persons convicted of the listed crimes. There is nothing random or arbitrary about the State's action in collecting DNA samples pursuant to [Kansas law]. Thus, a warrant is unnecessary to protect citizens from random or arbitrary DNA collection under the statute.

Accordingly, the DNA testing requirements of A.R.S. § 13-610 constitute reasonable searches and do not violate either the United States Constitution or the Arizona Constitution.

III. Conclusion

For all the reasons stated in this Response, the State asks this Court to deny the defendant's motion and order that the appropriate agency obtain a DNA sample from the defendant as required by A.R.S. § 13-610.